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**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
)	
Schools and Libraries)	WC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Waiver by)	Application No. 171045482
Bernalillo Public Schools)	
of the Commission's Rules)	

**REQUEST FOR WAIVER OF
SERVICE IMPLEMENTATION DEADLINE
FOR FUNDING YEAR 2017**

Pursuant to section 54.719(c) of the Commission's rules, the Bernalillo Public Schools (BPS, Bernalillo, or the District) hereby respectfully requests a waiver of section 54.507 of the Commission's rules for the above-referenced application. For the reasons set forth below, we request that the Wireline Competition Bureau (Bureau) grant this waiver request, and any other waivers necessary, to allow Bernalillo an additional twelve months to complete installation and to receive its committed E-rate funding.

I. BACKGROUND

Bernalillo Public Schools serves a diverse New Mexico community that is rich with history and culture. Several early Pueblo Indian and Spanish colonial sites, some dating back almost a



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thousand years, are nearby. The Rio Grande River winds through the heart of the school district and the Sandia Mountains rise to the east.

Our district consists of approximately 2,900 students who learn in a safe, secure and stimulating environment. Bernalillo Public Schools serve the communities of Algodones, Bernalillo, Pena Blanca, Sile, and the Native American pueblos including Cochiti, Santo Domingo, San Felipe, Santa Ana, and Sandia. There are ten schools in the district and several non-instructional facilities.

Historically, BPS lacked competition when seeking bids for its wide area network (WAN) services. Specifically, there were four locations that did not have access to scalable technology that could meet the FCC bandwidth goals. For these locations that did have access to scalable technology, prices were prohibitive in order to meet the increased demand by staff and students and to meet the FCC's bandwidth goals.

On March 20, 2017, BPS sought bids for telecommunications access services with the goal of increasing the bandwidth for its schools and reducing its costs. BPS received bids for leased lit, leased dark fiber, and self-provisioned fiber from three different vendors offering solutions that varied in terms.

The District awarded a contract to Kelly Cable (Kelly) for self-provisioned fiber because it submitted a comprehensive bid for the District's schools and because it was the least expensive solution. The bid included a special construction charge of \$2.54 million to deploy fiber to the



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District's schools. The price offered by other vendors were comparable to Kelly but, the other vendors had stipulations regarding tribal lands or were unwilling to deal with crossing tribal lands.

Some vendors did not include a fixed price, but instead offering pricing that included an unknown cost associated with crossing tribal lands. Absent crossing tribal lands there was no feasible way to connect some of these schools. The bid from Kelly was the only bid that could meet the district's needs and provide price certainty.

For Funding Year 2017, BPS submitted FCC Form 471 # 171045482, requesting E-rate funding for WAN services, including special construction charges.¹ USAC issued a funding commitment on December 14, 2017 almost seven months after the application was submitted. Given the scope of the project, neither the district nor Kelly were willing to begin construction until a positive funding decision was issued. The project involved laying almost 15 miles of fiber that required rights-of-way from four different Native American Governments, federal lands, and state lands. Due to the size of the project and numerous challenges, it was clear that the work could not be completed by June 30, 2018.

BPS timely submitted an FCC Form 500 #91973 to request an extension of the service implementation deadline and received an extension from USAC until June 30, 2019.² The district, the vendor, and the State of New Mexico have done everything in their power to complete the

¹ Exhibit 1, FCC Form 471.

² Exhibit 2, Revised FCDL Extending Service Delivery Deadline



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connections to the ten locations by June 30, 2019. Despite these efforts, the last site will not be lit by the June 30, 2019 deadline.

As of this writing nine of ten circuits have been lit or will be by June 30, 2019. There are many factors that have led to the fiber project being delayed beyond June 30, 2019. Out of a total of 76,000 feet of fiber, 30,000 feet have been laid thus far. Below is a high-level list of the reasons, which will be discussed in more detail.

- A late FCDL from USAC
- Negotiation of Rights-of-Way with four Native American governments
- Delays in permit approval from the Cibola National Forest and Grasslands
- Delays in payment from USAC to the vendor

A late FCDL by USAC clearly impacted the vendor's ability to complete the work by June 30, 2018 and, subsequently June 30, 2019. Based on an FCDL date of December 14, 2017, the vendor had less than 19 months to lay over 15 miles of fiber optic cable, including the one-year service delivery extension USAC granted. FCC rules initially allow an applicant up to 18 months to complete special construction projects, (January 1st prior to the start of the funding year to June 30th of the funding year). If USAC approves a one-year extension, an applicant is allowed up to 30 months to complete a special construction project. The truncated time the District had to complete this project was one of the major obstacles to completing the project by June 30, 2019.



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While the late FCDL did impact the project, the single largest impact relates to seeking approval of ROWs from four distinct Native American governments. The Bernalillo Public Schools fiber project must cross four Pueblos in order to complete the project. Bernalillo Public Schools leaders were challenged with negotiating with the four tribal governments for access to cross tribal lands, so they could begin fiber deployment to three of the seven outlying school sites. These negotiations took several months beginning in April of 2018 and a finally resulting in agreement in December of 2018.

Design, permits and most importantly construction all came to a halt during this time. After negotiations were complete, approval was still required from the Bernalillo Public Schools Board of Education and all four tribal governments. Although Bernalillo Public Schools had received a one-year extension from USAC, the nine months of negotiations had a detrimental effect on project completion.

The untimely delay to approve invoices by USAC created another significant impact on the project. The vendor was forced to halt work on the project from June of 2018 through March of 2019 due to invoicing issues with USAC on various E-Rate projects awarded to Kelly Cable. Due to further delays in receiving payments from USAC, Kelly was unwilling to move forward with construction until outstanding invoices were paid. We had no progress on the construction during these delays, but Kelly did continue to move forward with seeking ROWs from various entities.



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When Kelly Cable finally resolved the invoicing issues it still took them an additional couple of weeks to mobilize their work crews and continue the construction. Had the invoicing delays not caused the project to be slowed down considerably, it is likely all the sites could have been lit by June 30, 2019.

A large majority of the buildings in the historic district over 50 years old are considered by the ARC to either be a contributing structure or a significant structure. The ARC requires that an archeologist be present for all construction projects in an historic area to ensure if any items of historic importance are discovered, such as Native American and early Spanish Settlers artifacts, they are properly preserved. Should any items of historic importance be found, any construction must be halted and could require a rerouting of the fiber plant. While this did not occur on this project, the requirement to have an archeologist present did provide scheduling challenges that led to additional delays. This risk does remain for the final location to be connected.

As mentioned above, all of the locations have been or will be lit by 6/30/2019 with the exception of Placitas Elementary School. This location requires approximately two miles of fiber to run through the Cibola National Forest and Grasslands with several archeological sites in the proposed pathway. Initial information received from the Park Ranger indicates the approval process could take a minimum of four to six months.

“I have reviewed the proposal and have discussed with my resource specialists any concerns they may have. Based on a preliminary review, the project appears to go through two archeological sites. With that stated, a field visit will be required to see if the actual trench would impact the archeological site on the ground so we may determine the next steps in compliance to Section 106 of the National Historic Preservation Act. If there are no adverse



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effects to the archeological sites, this project should be eligible under a categorical exclusion (CE) in compliance with the National Environmental Policy Act. I understand that your request and need is imminent to be able to complete the installation by June 30. Unfortunately, there is no way for us to expedite this process and be in compliance with federal regulations relating to our environmental analysis and tribal consultation. If this action is eligible under a CE, I anticipate 4-6 months minimum for issuance of a permit. Please understand, we must also fit this project in with our current agency priorities and permit proposals currently in progress.”

Under the current timetable, the permit approval date is likely to fall somewhere in October 2019. Construction will take approximately two months once approval is received. Therefore, it appears turning up the circuits by the end of 2019 is possible. Because neither Kelly Cabling nor the district controls the permitting process we are requesting a year to light Placitas Elementary School. We believe asking for an additional 12 months allows for ample time for any additional delays in the permitting process.

Any one of these reasons justifies a waiver of the Service Delivery Deadline. However, when all of these factors are taken into consideration, it is surprising Kelly has completed construction and lit as many of the locations as they have. The district and Kelly did plan appropriately to complete installation by June 30, 2019, but unfortunately, circumstances beyond control of either party necessitates a second service delivery extension.

Because some of the Rights of Way and permitting have not yet been completed, the district is requesting an additional twelve months (June 30, 2020) to light the remaining location. The district is hopeful all sites will be lit sooner, as they are currently out of contract with their incumbent provider and are paying significantly higher month-to-month rates for WAN service.



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II. A WAIVER OF THE COMMISSION'S SERVICE INSTALLATION DEADLINE IS IN THE PUBLIC INTEREST

Bernalillo Public Schools respectfully requests a waiver of the Commission's rules in order to complete its fiber project. First, Bernalillo's project was "unavoidably delayed due to weather or other reasons" outside of its control.³ Second, BPS satisfies the criteria established by the Commission for extensions of the deadline for non-recurring services. Finally, granting this waiver will serve the public interest and will help to achieve the goals of the E-rate program by bringing affordable broadband to students in the Bernalillo area.

Any of the Commission's rules may be waived if good cause is shown.⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁶

In May 2018, the Wireline Competition Bureau adopted an order granting a service implementation extension with similar circumstances as those faced by BPS.⁷ The Bureau noted that the delay in processing the FY 2016 funding request submitted by the Utah Education and

³ FCC 14-189, para. 49; DA 18-473.

⁴ 47 C.F.R. § 1.3.

⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁷ Request for Waiver by Utah Education and Telehealth Network, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, DA 18-473 (WCB 2018)



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Telehealth Network (UETN) and the initial denial of UETN's application left UETN with an inadequate amount of time to complete its complex special construction project.⁸ The Bureau also noted that UETN's service provider would not continue with construction absent waiver of the service implementation deadline because it would not have sufficient time to complete the installation of services.⁹ The Bureau also noted the complexity of the build and the short construction season as reasons to extend the deadline for two years.¹⁰

In October 2018, the Wireline Competition Bureau issued a similar waiver request for Grants/Cibola County School District and the Jemez Pueblo Tribal Consortium.¹¹ The fact pattern present here is very similar to the fact pattern in the Jemez Pueblo Consortium. The district and the vendor made every effort possible to complete the work, but challenges with PNM, DOT, and the other factors presented above only allowed for 65 % of the fiber plant to be completed by June 30, 2019. However, 90% of the locations have been completed and the remaining site is the most complicated section of the build. In granting the waiver for the consortium, the FCC considered the fact that the majority of locations were lit by June 30. We believe the Commission should apply that same principle for the Bernalillo project.

⁸ *Id.* at ¶ 10.

⁹ *Id.* at ¶ 10.

¹⁰ *Id.* at ¶ 11.

¹¹ Request for Waiver by Grants/Cibola County School District and Jemez Pueblo Tribal Consortium, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, DA 18-1060 (WCB 2018)



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Here, BPS faced similar challenges. While BPS received a funding commitment, the issuance of the FCDL did not occur until over six months after the filing of the Form 471. Just like UETN, Grants, and the consortium, BPS faced delay in the processing of its application. Now, BPS's service implementation is about to pass before the small percentage of the project can be completed. Absent a waiver from the FCC, the project will be in violation of program rules.

The Bureau granted UETN two additional years to complete its project, given the unique challenges involved in the construction. Grants/Cibola was given an additional 18 months and the Consortium was given one additional month.

Second, the grant of a waiver here would be consistent with the Commission's service extension rule for non-recurring services.¹² The rule allows an extension to be granted if the applicant satisfies one of four criteria.¹³ Two of those criteria is relevant to Bernalillo:

- The applicant's service provider is unable to complete implementation for reasons beyond the service provider's control
- The applicant requested an extension because the service provider has been unwilling to complete delivery and installation after USAC delayed payment while reviewing the application for program compliance.

The inclusion of these rationales in the Commission's rule demonstrates that the Commission believes they serve as reasonable justifications for delay in installation of services.

¹² 47 C.F.R. § 54.507(4).

¹³ *Id.*

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BPS meets the criteria defined in the FCC rules. Completion of the project was delayed for reasons beyond the control of Kelly.

Finally, strict application of the rule in this instance would not be in the public interest. Denial of this waiver would significantly impact the district's ability to provide adequate bandwidth, at a reasonable cost, to some of its more rural students.

BPS believes that denying E-rate funding under these circumstances would be unjust, and that waiving the rule to the extent necessary would be efficient and consistent with the public interest. As such, BPS respectfully argues that a waiver of the Commission rules is in the public interest.

III. CONCLUSION

For the foregoing reasons, the Bureau should grant Bernalillo's request for waiver. The Bureau should also grant a waiver of any other rules, such as the invoicing deadline rules, necessary to allow Bernalillo an additional twelve months to complete the fiber installation and to utilize its funding commitment.

Respectfully submitted,

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